

Docket No. 189,244

On June 15, 1995, the application of the claimant for review by the Kansas Workers Compensation Appeals Board of an Award entered by Administrative Law Judge George R. Robertson dated February 1, 1995 came on for oral argument.

Claimant appeared by and through his attorney, Julie A. Bedinghaus of Great Bend, Kansas. Respondent and its insurance carrier appeared by and through their attorney, Jerry M. Ward of Great Bend, Kansas. There were no other appearances.

The record and stipulations as specifically set forth in the Award of the Administrative Law Judge are herein adopted by the Appeals Board.

- (1) What is the impact of K.S.A. 44-510(c)(2) upon the admissibility of the deposition of Dr. Ernest Schlachter?
- (2) What, if any, is the nature and extent of claimant's injury and/or disability?

Having reviewed the whole evidentiary record filed herein, and in addition the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

K.S.A. 44-510(c)(2) states as follows:

“Without application or approval, an employee may consult a health care provider of the employee's choice for the purpose of examination, diagnosis or treatment, but the employer shall only be liable for the fees and charges of such health care provider up to a total amount of \$500. The amount allowed for such examination, diagnosis or treatment shall not be used to obtain a functional impairment rating. Any medical opinion obtained in violation of this prohibition shall not be admissible in any claim proceedings under the workers compensation act.”

The Administrative Law Judge excluded the testimony and report of Dr. Ernest Schlachter as being in violation of K.S.A. 44-510(c)(2). While Dr. Schlachter did not specifically provide an impairment rating he did address claimant's other limitations and restrictions and gave an opinion regarding task loss. The Administrative Law Judge, in finding this was misuse of the unauthorized medical allowance, opined that Dr. Schlachter's opinion was solicited not for the purpose of securing additional treatment or diagnosis but, instead, was in substantial noncompliance with the legislative mandate of K.S.A. 44-510(c)(2).

The Appeals Board disagrees with the Administrative Law Judge's opinion. K.S.A. 44-510(c)(2) specifically prohibits the use of the unauthorized medical for the purpose of obtaining a functional impairment rating. The unauthorized medical is specifically designated for the purpose of examination, diagnosis or treatment. The language of the statute is clear. It neither prohibits the unauthorized medical allowance to be used to obtain restrictions against future physical activities, nor does it specifically prohibit an opinion from a physician regarding a claimant's loss of ability to perform work tasks performed during the 15 years preceding the claimant's accident. As such, the Appeals Board finds the Administrative Law Judge's exclusion of Dr. Schlachter's opinion regarding claimant's restrictions and loss of ability to perform work tasks is inappropriate and should be, and is hereby, reversed.

In considering the claimant's entitlement to an award, the Appeals Board must look at both the medical records and opinion of Dr. Schlachter, the medical records and opinion of Dr. Brown and the income information provided from claimant's 1994 tax records. The record indicates that claimant has elected to remove himself from the labor market entirely. K.S.A. 44-510e(a) states in part:

“An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.”

The Court of Appeals in *Fouk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995), declared that the Workers Compensation Act should not be construed to award benefits to a worker for refusing a proffered job which the worker has the ability to perform. In this instance the claimant, a farmer before going to work for respondent, and a farm manager after leaving respondent's employment, is attempting to sell all of his farm property even though, with the physical restrictions placed upon him by both Dr. Schlachter and Dr. Brown, he would be physically capable of performing many of the activities involved in farming. It is also noted claimant has obtained substantial income from the proceeds of the farm while managing the day-to-day operations of the farm and receives a weekly income which exceeds the average gross weekly wage claimant was earning at the time of the injury.

The Appeals Board finds, based upon the evidence presented, that the claimant is entitled to no work disability per K.S.A. 44-510e(a) and, as such, claimant is entitled to an award based upon his functional impairment.

In reviewing the evidence in the record it is noted that while Dr. Schlachter did provide restrictions and a task loss opinion he provided no opinion regarding claimant's functional impairment. As such, the opinion of Dr. Brown opining that claimant has suffered an 8 percent functional impairment to the body as a whole is uncontradicted in the record and is accepted by the Appeals Board as an appropriate award in this matter.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge George R. Robertson dated February 1, 1995 is affirmed in part and reversed in part as follows:

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Douglas L. Funk, and against the respondent, Sunflower Training Center, and its insurance carrier, Travelers Insurance Company, for an accidental injury which occurred August 31, 1993. Based upon an average weekly wage of \$182.00, for 25.71 weeks of temporary total disability compensation at the rate of \$121.34 per week or \$3,119.65, followed by 32.34 weeks functional disability at the rate of \$121.34 per week or \$3,924.14 for an 8% permanent partial general body disability, making a total award of \$7,043.79.

As of April 30, 1996, the entire award would be due and owing claimant which is ordered paid in one lump sum less any amounts previously paid.

Claimant is further awarded medical expenses per the Award of the Administrative Law Judge.

Unauthorized medical is awarded up to the statutory maximum upon presentation of an itemized statement verifying same.

Future medical will be considered upon proper application to and approval by the Director.

Claimant's attorney fee contract is approved insofar it is not in contravention to K.S.A. 44-536.

The fees necessary to defray the expense of administration of the Workers Compensation Act are hereby assessed against the respondent to be paid as follows:

Owens, Brake & Associates Regular Hearing Transcript	\$362.03
Underwood & Shane Deposition of Dr. C. Reiff Brown	\$153.00
Harper & Associates Deposition of Dr. Ernest Schlachter	\$170.42

IT IS SO ORDERED.

Dated this ____ day of May 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Julie A. Bedinghaus, Great Bend, KS
Jerry M. Ward, Great Bend, KS
George R. Robertson, Administrative Law Judge
Philip S. Harness, Director